No. 87-1302

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN GUSHIKEN, ETC., ET AL., PETITIONERS

v.

THOMAS FUJIKAWA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a trustee of an employee benefit plan may, without first submitting the issue to the plan as a claim for benefits, sue his co-trustees in federal court, alleging that they breached their fiduciary duties under Section 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104(a), by stopping benefit payments to plan participants and beneficiaries during a strike against the employers who appointed them.

2. Whether a trustee may bring such an ERISA suit where the plan is established jointly by employer and employee organizations and has procedures for resolving trustee deadlocks on the administration of the plan, but the trustee has not exhausted these procedures.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners—John Gushiken, Rodney Kim and Nick Teves—are three employer-appointed trustees of several employee benefit plans[1] that a multi-

[1] Each plan had an equal number of trustees appointed by the employer and by the union. Pet. App. A9.

employer group, the Pacific Electrical Contractors Association (PECA), and the International Brotherhood of Electrical Workers (IBEW) established pursuant to Section 302(c) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(c) (Pet. App. A8-A9).[2] The purpose of these plans is to provide supplemental unemployment, training, vacation, holiday, and other benefits to eligible employees (Br. in Opp. App. A4-A9). Section 404 (a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104(a)(1), requires, among other things, that the plans' trustees discharge their duties "solely in the interest of the participants and beneficiaries[,] * * * for the exclusive purpose of * * * providing benefits * * *." As required by Section 302(c) of the LMRA, the plans provide for arbitration to resolve deadlocks between the employer-appointed and union-appointed trustees on the administration of the plans (Pet. App. A98-A99). As required by Section 503 of ERISA, 29 U.S.C. 1133, and Department of Labor regulations (see Pet. App. A76-A92), they also establish procedures by which participants or beneficiaries or persons claiming under them may obtain review of denied claims for benefits (*id.* at A93-A98).

In 1984, following the expiration of a collective bargaining agreement and during a four-month

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[2] Section 302(c)(5)(B) of the LMRA allows employers to contribute money to an employee benefit trust fund, subject to certain statutory requirements, among them that the fund be used only for specified benefits which are paid on the basis of a written agreement between an employer and a union. Employees and employers must be equally represented in the administration of the fund. 29 U.S.C. 186(c)(5)(B); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-329 (1981).

strike, petitioner Kim, who is also the Executive Secretary of PECA, instructed the plans' administrative office to stop paying benefits pending a meeting of the trustees to decide what benefits should be paid during the strike (Pet. App. A11-A12). The plans' administrator, who had depended on trustee signature or approval for certain benefit payments,[3] complied with Kim's instruction (*id.* at A12). During the strike, petitioners Kim and Gushiken refused to sign benefit checks, and petitioner Teves instructed the administrative office not to approve requests for loans based on financial hardship (*id.* at A12-A13).[4] After the strike ended and a new collective bargaining agreement was ratified, petitioners resumed signing benefit checks for participants and beneficiaries who waived their right to sue the trustees for failure to pay benefits during the strike (*id.* at A13).

While the strike was in progress, respondent Fujikawa, a union-appointed trustee of the plans, sued petitioners in federal district court. He alleged that they had breached their fiduciary duties to the plans and their accompanying duty to act solely in the best interests of the plans' beneficiaries by refusing to sign or approve benefit checks to striking workers,

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[3] The practice was to have both an employer-appointed and a union-appointed trustee sign checks for supplemental unemployment or training and vacation benefits (Pet. App. A10). Computerized signatures authorized payment of health and welfare benefits and supplemental unemployment benefits under $500, and a custodian bank directly disbursed annuity and pension benefits that the trustees approved (*id.* at A11).

[4] Petitioners apparently continued these practices after counsel for the plans issued an opinion concluding that when a labor agreement expires the affected plan continues to operate as needed to wind up its affairs and must pay benefits during the winding up period (Pet. App. A39; Br. in Opp. 6).

which strengthened PECA's bargaining position in its negotiations with the IBEW (Pet. App. A13-A14). Respondent did not invoke either the plans' procedures for submitting benefit claims or the LMRA-required arbitration procedures for resolving trustee deadlocks before filing this suit.

2. The district court dismissed respondent's suit on the ground that he had failed to exhaust the plan procedures under which a participant or beneficiary could challenge a denial of benefits (Pet. App. A40-A42). The court construed respondent's ERISA claim as one for benefits and found that his status as a fiduciary, rather than a participant or beneficiary, did not bar the applicability of these plan procedures (*id.* at A42).

3. The court of appeals reversed. Initially, the court noted that the denial of benefits to striking workers weakens the ability of a union and its members to withstand prolonged economic conflict and that the order by employer-appointed trustees to change the practices of paying benefits after the strike began raised a substantial question about whether these trustees ordered the change to improve the employers' bargaining position (Pet. App. A17-A18). Because petitioners' counsel conceded at oral argument that the plans' provision governing challenges to individual eligibility determinations did not apply to respondent, the court did not discuss further the district court's finding that exhaustion of these procedures was required (*id.* at A18-A19).

The court also rejected petitioners' argument that respondent had to exhaust the arbitration procedures that Section 302(c)(5)(B) of the LMRA requires to be pursued in the event of a deadlock among the

trustees. In accordance with that Section, the trust agreement between PECA and the IBEW provides that when the employer-appointed and union-appointed trustees disagree in disputes over the administration of the plans, a neutral umpire, *i.e.*, an arbitrator, must resolve the deadlock (Pet. App. A22-A23, A99). Referring to its previous decision in *Amaro* v. *Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), which found no requirement of exhaustion of contractual grievance procedures prior to a federal court suit alleging solely a violation of a protection afforded by ERISA Section 510,[5] the court concluded "that plaintiffs suing for violation of an ERISA statutory provision * * * have a direct right to sue in federal court, without regard to" internal dispute resolution procedures (Pet. App. A20-A21). This rule applies, the court stated, whether the dispute procedure is established by contract or by the LMRA requirements (*id.* at A22).

The court of appeals also concluded that, in any event, the LMRA's arbitration requirement does not apply to respondent's claim (Pet. App. A22-A25). That requirement applies to trustee deadlocks over " 'administration of [the] fund,' " which the Ninth and Second Circuits have interpreted to mean operation of the funds "under the trust instrument" (*id.* at A23) or disputes on issues "that the trustees have authority to decide by virtue of the terms and provisions of the trust agreements" (*id.* at A24, citing, inter alia, *Mahoney* v. *Fisher*, 277 F.2d 5 (2d Cir. 1960) and *Barrett* v. *Miller*, 276 F.2d 429 (2d Cir.

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[5] Section 510, 29 U.S.C. 1140, prohibits, among other things, interference with the attainment of rights to which a participant or beneficiary may become entitled under an employee benefit plan.

1960)). The court found it clear that disputes over statutory duties are not included in these interpretations of Section 302(c)(5)(B) of the LMRA (Pet. App. A24). Even under the "'broad interpretation'" of the statutory language, reading all disputes as involving "'administration of [the] fund'" except those in which the trustees attempted to exceed their powers under the trust, the court concluded that respondent was not required to utilize the arbitration procedures (*id.* at A24-A26). Respondent's allegation that petitioners represented the employers who appointed them rather than the plan's beneficiaries states a claim that these trustees acted in a way that "clearly exceeds" their power, the court concluded (*id.* at A25).

In remanding the case, the court of appeals directed the district court to consider whether referral of the matter to an umpire might assist its decision-making process in any way, and to make such a referral if appropriate (Pet. App. A33). Although it said that petitioners' argument that strikers were not employees appeared to be frivolous (*ibid.*), it noted certain ways in which such a referral might be of assistance (*id.* at A33-A34), and made clear that "on remand the district court may, in its discretion, refer the matter to an umpire, to reconsider Fujikawa's motion for summary judgment or consider such other appropriate motion as the parties make" (*id.* at A34-A35).

DISCUSSION

The court of appeals' decision is correct in concluding that respondent was not required to exhaust plan procedures relating to claims for benefits, since such procedures are available only to claimants and not

to trustees. With regard to its rejection of the asserted requirement that respondent exhaust the LMRA's deadlock procedure, the legal question is, as set forth below, somewhat more difficult. However, because the court remanded to the district court for further consideration of a referral to arbitration, the issue is not, in any event, ripe for review by this Court.

1. Although petitioners assert that the decision of the court below conflicts with decisions of other courts of appeals requiring exhaustion of plan remedies before bringing suit on a claim for benefits,[6] they quite correctly conceded below that respondent had no plan remedies to exhaust (Pet. App. A18-A19). The plan, consistent with regulatory require-

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[6] We agree that there is a conflict in the circuits over the scope of the exhaustion requirement as applied to claims for benefits. The Third and Ninth Circuits have distinguished actions brought to assert statutory rights, for which exhaustion is not required, from claims for benefits under a plan, for which exhaustion is required. See Pet. App. A20; *Burke* v. *Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985); *Zipf* v. *AT&T*, 799 F.2d 889 (3d Cir. 1986); *Gavalik* v. *Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), cert. denied, No. 86-1659 (Dec. 7, 1987); *Amaro* v. *Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

The Seventh and Eleventh Circuits, in contrast, have required the exhaustion of plan remedies before a plaintiff may bring a suit for infringement of rights under ERISA. See *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 465-467 (7th Cir. 1986), cert. denied, No. 86-933 (Jan. 27, 1987); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1243-1245 (7th Cir. 1983); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219, 1224-1227 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). Cf. *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, No. 86-1546 (8th Cir. Apr. 6, 1988) (enforcing agreement to arbitrate ERISA claims in suit alleging mismanagement of pension and profit sharing accounts).

ments, provides for review of claims submitted by an "employee or beneficiary or person claiming under them" (Pet. App. A93; 29 C.F.R. 2560.503-1(a)). But a trustee is not an employee or beneficiary, and has separate duties to the plan as a whole. See *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1985); *id.* at 151 (Brennan, J., concurring). And respondent did not make a claim for benefits, but rather sought to compel petitioners to perform their fiduciary duties as enunciated in ERISA by pursuing the statutory remedy created for that purpose (§ 502(a)(3), 29 U.S.C. 1132(a)(3)). Because respondent was not pursuing a claim for benefits "under" an employee or beneficiary, he was not entitled to utilize the plan claim review procedures.[7]

2. While not subject to such categorical analysis, the court of appeals' conclusion that respondent was not necessarily required to exhaust the LMRA's procedures for arbitration of deadlocks also does not merit this Court's attention. In the first place, there

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[7] Indeed, respondent, a trustee, had no right to sue for benefits under ERISA. See Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B) (participant or beneficiary—not trustee or Secretary of Labor—is authorized to bring civil actions to recover benefits).

The absence of applicable plan remedies makes this case like *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228 (1972). There the question presented was whether exhaustion of a collective bargaining grievance procedure was required before bringing suit under the Fair Labor Standards Act to recover overtime compensation. This Court dismissed the petition in *Iowa Beef Packers* as improvidently granted after learning at oral argument that there were no procedures to exhaust because the grievance procedure was limited to the resolution of alleged violations of the collective bargaining agreement (*id.* at 229-230).

is much to be said for the court's view that allegations of ERISA violations by plan trustees may proceed directly to court, with exhaustion limited to that which the district court finds appropriate as a matter of discretion.

Congress intended claims alleging violations of provisions of ERISA to be within the "exclusive jurisdiction" of federal courts. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); see also 120 Cong. Rec. 29933 (1974) (statement of Sen. Williams). This exclusive federal court jurisdiction implements Congressional intent that ERISA's enforcement provisions would "remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities." S. Rep. 93-127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1 Staff of the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 621 (Comm. Print 1976) (*Leg. Hist.*); H.R. Rep. 93-533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 2 *Leg. Hist.* 2364.[8] Moreover, ERISA is a statute designed to provide minimum standards to protect the interests of individual workers. See Section 2(a), 29 U.S.C. 1001(a); *Central States Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559,

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[8] The legislative history suggests that Congress, in enacting ERISA, intended to provide more effective remedies than those available under the LMRA. See S. Rep. 93-127, *supra*, at 4, *reprinted in* 1 *Leg. Hist.* 590; H.R. Rep. 93-533, *supra*, at 4, *reprinted in* 2 *Leg. Hist.* 2351. See also *United Mine Workers Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573 n.12 (1982) (It is an open question whether Section 302(c)(5) of the LMRA provides statutory remedies for breach of fiduciary duty claims.).

569-570 (1985); S. Rep. 93-127, *supra*, at 5, *reprinted in* 1 *Leg. Hist.* 591; H.R. Rep. 93-533, *supra*, at 11-12, *reprinted in* 2 *Leg. Hist.* 2358-2359. In such a context, this Court has repeatedly recognized that the policies favoring arbitration are less persuasive. *Atchison, T. & S.F. Ry.* v. *Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 7-8; *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743-745 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974); cf. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, No. 87-259 (June 6, 1988), slip op. 11-12. Enforcement of the standards set forth in ERISA is furthered by the court of appeals' approach rejecting any automatic requirement of exhaustion of the LMRA arbitration remedy in favor of making such referral a matter for the district court's discretion.

At the same time, it may be argued that arbitration is appropriate prior to litigation because respondent's claim is related to, though not necessarily dependent on, the underlying issue of entitlement to benefits under the plan.[9] Section 302(c)(5)(B) is seemingly mandatory in requiring referral to an

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[9] Respondent contends, by his action under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), that petitioners, his co-trustees, breached their fiduciary duty as trustees to act solely in the interest of the plan and its beneficiaries when they stopped benefit payments during a strike (Pet. App. A13). Petitioners defend by alleging they acted in accord with plan documents. *Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 334-335 (3d Cir. 1984), indicates that when fiduciaries act for impermissible motives or imprudently create disputes subject to the LMRA deadlock procedures, they violate ERISA fiduciary duty requirements, regardless of whether their acts are inconsistent with plan terms.

umpire where the trustees deadlock over a matter of administration of the fund. See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 338 (1981). It is therefore not clear that the statute is best read, in the manner of the court of appeals, to exclude allegations of trustee conduct in excess of authority, at least where the allegations include, as here, issues of plan interpretation. Further, in this case, the trust agreement arguably expanded on the language of the statute to require referral to an umpire of deadlocks on "any matter." See Pet. App. A99. It is a substantial step, which the Court has not always been willing to take, to conclude that a considered agreement to arbitrate should be set aside in favor of an exclusive judicial remedy. See *Shearson/American Express, Inc.* v. *McMahon*, No. 86-44 (June 8, 1987), slip op. 4-6.

The court of appeals' approach is also in some tension with the decision of the Court of Appeals for the Second Circuit in *Alfarone* v. *Bernie Wolff Constr. Corp.*, 788 F.2d 76, cert. denied, 479 U.S. 915 (1986), which also involved an exhaustion issue under the LMRA's deadlock provision. In *Alfarone*, union and management trustees were deadlocked over whether the employer owed certain benefit contributions under the collective bargaining agreement, and whether suit should be filed to recover them (788 F.2d at 78). The union trustees proceeded directly to court, seeking to compel the employer to make the benefit contributions, and alleging that the management trustees breached their ERISA fiduciary duties by not joining as plaintiffs in the suits (*id.* at 77-78). The court of appeals required exhaustion of the arbitration remedy on the question of whether to sue under the trust agreements for the contributions. It noted (*id.* at 79) that the plans

"expressly provided a remedy for deadlock among the trustees on the question whether to sue under the trust agreements for contributions," and concluded that to allow the action to proceed without referral to arbitration "would violate the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases. See *Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983)."

While *Alfarone* is thus contrary in spirit to the approach of the court of appeals in this case, it is not in conflict. Elsewhere in the opinion, the court in *Alfarone* ruled that the management trustees had not breached their fiduciary duty in refusing to join in the suit to recover benefit contributions (788 F.2d at 80). Having rejected on the merits the statutory ERISA claim, all that remained was the underlying question of contract interpretation. The court of appeals in this case made clear (Pet. App. A23) that, in such a context, it would agree that exhaustion is required. See *Amato* v. *Bernard*, 618 F.2d 559, 561 (9th Cir. 1980).

In any event, this case does not merit review by this Court at the present time because of its current procedural posture. The court of appeals remanded to the district court with instructions to "consider whether its decision-making process would be aided in any way were it to direct that the dispute be submitted to an umpire and, then, receive a copy of his decision" (Pet. App. A33). The district court is thus to consider further the issue of arbitration referral presented in the petition. It is unclear whether respondent will, in fact, be required to resort to arbitration on plan-related issues before proceeding further with his claim of a fiduciary breach under ERISA. Should such referral be denied, peti-

tioners will have ample opportunity to renew their present contentions, along with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Review at the present time would therefore be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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